



FEDERAL ELECTION COMMISSION
Washington, DC 20463

December 18, 2000

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2000-24

Neil Reiff
Sandler & Reiff
6 E Street, S.E.
Washington, D.C. 20003

Dear Mr. Reiff:

This responds to your letters dated August 30 and October 6, 2000, on behalf of the Alaska Democratic Party (“ADP”), requesting an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended (“the Act”), and Commission regulations to the allocation of ADP’s expenditures for mixed Federal and non-Federal activities and whether the Act would preempt a State’s restrictions on ADP with respect to allocation.

For the 1999-2000 election cycle, ADP has disclosed that its allocation percentages for disbursements to finance activities that influence both Federal and non-Federal elections is 40% Federal and 60% non-Federal.¹ You state that “new Alaska contribution restrictions make it difficult” for ADP to raise funds for its non-Federal account, and, as a consequence, ADP raises substantially more funds for its Federal account than for its non-Federal account. Alaska’s revised (in 1997) campaign finance statute provides for contribution limits and prohibitions for non-Federal activity that are more restrictive in some respects than the Act’s limits and other provisions governing

¹ ADP has made this disclosure on its Schedule H1 (the Commission disclosure form showing the point allocation and percentage for ballot composition) which indicates an allocation of two Federal points and three non-Federal points. ADP designated one point each for U.S. President and U.S. Congress and one point each for State Senate, State Representative, and an extra non-Federal point. No points were allocated for local candidates.

contributions made to influence Federal elections.² Although ADP would prefer to make payments reflecting its stated allocation percentages throughout the cycle, cash flow considerations, as well as the requirement in Commission regulations that all allocation transfers be made no earlier than ten days before or later than sixty days after a disbursement, may not allow ADP to fully avail itself of the right to transfer the appropriate portion of non-Federal funds for each disbursement. *See* 11 CFR 106.5(g)(2)(ii)(B). Hence, although ADP has selected a ballot composition formula for such payments within the requirements of the Commission regulations, it has been utilizing funds from its Federal account in amounts significantly greater than the 40% Federal percentage.

ADP has engaged in discussions with the Alaska Public Offices Commission (“APOC”), which is the State of Alaska’s agency for campaign finance regulation, about the Federal/non-Federal allocation of administrative and generic voter drive activity. APOC states that, because most of ADP’s activity is non-Federal activity, some portion of its administrative and generic voter drive activity should be paid for with funds subject to the limits and prohibitions of Alaska law. APOC takes the position that funds in compliance with only Federal law, but not the more restrictive Alaska law, may not be used for non-Federal purposes. APOC has not asked ADP to select a Federal percentage that falls below 40% (the amount resulting from the ballot composition formula described in Commission regulations), nor has it specified any precise allocation percentage. Instead, APOC states that it will accept an allocation percentage that ADP determines, in good faith, to represent non-Federal funds for use in support of non-Federal activity and Federal funds in support of Federal activity, and it asks that ADP make payments accordingly.³ APOC also states that if ADP ever determines in good faith that there is any change in the proportion of administrative and generic voter drive expenses supporting Federal and State activity, it may change the allocation. Because ADP expends Federal contributions to pay most of the administrative and generic voter drive expenses, APOC issued a letter to ADP to the effect that it must use funds that meet the requirements of Alaska law for activities conducted with respect to non-Federal elections.⁴

² These more restrictive provisions include the following: (1) a “group” (which is essentially an Alaskan political committee) that is not a political party may contribute no more than \$1,000 per year to another group or political party. Alaska Statutes (“AS”) §15.13.070(c)(2); (2) a corporation, company, partnership, firm, association, organization, business trust or surety, labor union, or public funded entity that does not satisfy the definition of a group may not contribute to Alaskan candidates or groups, including political parties. AS §15.13.074(f); and (3) a group or political party may not accept more than ten percent of its total contributions during the calendar year from individuals that are not Alaska residents. AS §15.13.072(f).

³ APOC states that, for example, if ADP determines that their generic voter drives actually affect more Federal candidates than non-Federal candidates, then their overall allocation percentage should reflect that.

⁴ This summary of APOC’s position is derived from its letters dated September 20 and 21, 2000, which are comments on ADP’s request. APOC also states that it does not necessarily require ADP to pay for the expenses allocable to non-Federal activity out of a non-Federal account. If the funds used are derived from contributions that meet the requirements of Alaska law, they would be permissible, even if they came from a Federal account.

To the extent that cash flow considerations preclude the transfer of non-Federal funds within the 70-day window, ADP wishes the Commission to confirm that it may forgo the option of making such transfers for all or part of the non-Federal portion of an administrative or generic voter drive expense, and thereby pay more than 40% of its allocable expenses with Federal account funds or even pay all such expenses with Federal funds. Accordingly, ADP asks the Commission to conclude that the Act and Commission regulations preempt any requirement imposed by APOC that would limit the amount of Federal account funds that it uses to pay for administrative and generic voter drive expenses, including any APOC requirement that would prevent ADP from using only Federal account funds for administrative and generic voter drive activity.⁵

ADP bases its request, in part, on the Commission's analysis and conclusion in Advisory Opinion 1993-17. In that opinion, the Commission concluded that the Act and Commission regulations preempted a State agency interpretation requiring a State party to include certain non-Federal points in its ballot composition formula, even when the State agency was not directing the party to adopt an allocation percentage that was contrary to the Federal allocation regulations.

The Commission's response to your question depends upon its interpretation of the regulations pertaining to the Federal/non-Federal division of allocable expenses, whether the regulations provide flexibility for the State party committee to use more Federal funds than the percentages derived from the regulations, and whether the Act or State law controls as to the ability of a committee to use more Federal account funds than the minimum provided for in the regulations.

Applicable Regulations on Allocation

Commission regulations at 11 CFR 106.5 provide that party committees that make disbursements in connection with Federal and non-Federal elections "shall make those disbursements entirely from funds subject to the prohibitions and limitations of the Act, or from accounts established pursuant to 11 CFR 102.5," which provides for the establishment of Federal and non-Federal accounts. 11 CFR 106.5(a) and 102.5(a).

Party committees that establish separate Federal and non-Federal accounts shall allocate specific categories of expenses between those two accounts according to section 106.5. Two of these categories are: (1) administrative expenses, including rent, utilities, office supplies, and salaries, except for expenses directly attributable to a clearly

⁵ You state that ADP is not requesting preemption for disbursements for the direct costs of a fundraising program where Federal and non-Federal funds are collected by one committee through such program or event, and party committee activities exempt from the definition of contribution and expenditure under specific regulatory sections because "it is clear that such activities have a direct relationship to non-federal accounts and elections." 11 CFR 106.5(a)(2)(ii) and (iii). See footnote 6.

You observe that almost all the funds raised by both the Federal and non-Federal accounts of ADP are within the limits and prohibitions of Alaska law. Nevertheless, the Federal account might still raise funds that would not be permissible under Alaska law. You note, for example, that, under Alaska law, non-Federal contributions from national party committees are subject to the ten percent out-of-state limit.

identified candidate; and (2) expenses for generic voter drives including voter identification, voter registration, and get-out-the-vote-drives, or any other activities that urge the general public to register, vote, or support candidates of a particular party or associated with a particular issue without mentioning a specific candidate.⁶ 11 CFR 106.5(a)(2)(i) and (iv).

Commission regulations provide that state party committees with separate Federal and non-Federal accounts shall allocate their administrative expenses and generic voter drive costs between those accounts using the "ballot composition method." This method is based on the ratio of Federal offices to total Federal and non-Federal offices expected on the ballot in the State's next general election. 11 CFR 106.5(d)(1)(i). The ballot composition ratio is determined at the start of each two-year Federal election cycle, in accordance with a point system set out in 11 CFR 106.5. The offices of President, United States Senator, and United States Representative count as one Federal point each, and the offices of Governor, State Senator, and State Representative count as one non-Federal point each, if expected on the ballot in the next general election. If other partisan statewide executive candidates will be on the ballot, these offices count as no more than two non-Federal points in the ratio. Similarly, if any partisan local offices are expected on the ballot in any regularly scheduled election during the two-year cycle, these offices count as one non-Federal point. Finally, the rules also allow state parties to include an additional, generic non-Federal point. 11 CFR 106.5(d)(1)(ii).

Commission regulations also provide that committees with separate Federal and non-Federal accounts shall pay their allocable expenses in one of two ways. 11 CFR 106.5(g)(1). The committee can pay the entire amount of an expense (e.g., a billed amount) from its Federal account and transfer funds from its non-Federal account to its Federal account solely to cover the non-Federal share of the allocable expense. 11 CFR 106.5(g)(1)(i). In the alternative, the committee can establish a separate allocation account into which funds from its Federal account and its non-Federal account will be deposited solely for the purpose of paying the allocable expenses of mixed Federal and non-Federal activity. Funds from the Federal and non-Federal account will be transferred in amounts proportionate to the Federal and non-Federal share of each allocable expense. Once a committee has established a separate allocation account, all allocable expenses must be paid from that account so long as the account is maintained. Furthermore, no funds maintained in this account may be transferred to any other account or committee. 11 CFR 106.5(g)(1)(ii). Under either option, the committee must transfer funds from its non-Federal account to its Federal account, or from its Federal and non-Federal account to the separate allocation account, no more than 10 days before or more than 60 days after the bills for those activities are paid.

⁶ The other two types of expenses are: (1) direct costs of a fundraising program where Federal and non-Federal funds are collected by one committee through such program or event; and (2) State and local party activities exempt from the definition of contribution and expenditure under 11 CFR 100.7(b)(9), (15), or (17), and 100.8(b)(10), (16), or (18) where such activities are conducted in conjunction with non-Federal activities. 11 CFR 106.5(a)(2)(ii) and (iii).

Partially Discretionary Nature of Allocation

The Commission notes that the regulations use the phrase “shall” in explaining the requirements pertaining to allocation. For example, the general rules for allocation state that political committees that have established Federal and non-Federal accounts “shall allocate expenses between those accounts” according to 11 CFR 106.5. 11 CFR 106.5(a)(1). In discussing the computation of the ballot composition formula, at 11 CFR 106.5(d)(1)(ii), Commission regulations use the phrase “shall” in stating which offices are to be used and how many points are to be assigned; for example, “The committee shall count the offices of Governor, State Senator, and State Representative, if expected on the ballot in the next general election, as one non-federal office each.” The word “shall” carries the presumption that it is used in the imperative. On its face, this suggests that the rules require party committees to use the exact ballot offices and the exact percentage of Federal and non-Federal funds derived from the use of the offices, i.e., no more and no less than the specified amount of both Federal and non-Federal funds.

Significantly, however, when the Commission promulgated comprehensive regulations on allocation in March 1990, it explained a general principle underlying the allocation regulations, as follows:

One of the alternatives described in the Notice of Proposed Rulemaking offered committees the option of defraying the total cost of an allocable activity with funds raised under federal law. This option has been retained in paragraph 106.5(a)(1), reflecting the Commission’s view that allocating a portion of certain costs to a committee’s non-federal account is a permissive rather than a mandated procedure. Thus, the amounts that would be calculated under the rules for a committee’s federal share of allocable expenses represent the minimum amounts to be paid from the committee’s federal account, without precluding the committee from paying a higher percentage with federal funds.

Methods of Allocation Between Federal and Non-Federal Accounts; Payments; Reporting, 55 Fed. Reg. 26058, 26063 (June 26, 1990).

Moreover, the Explanation and Justification in 1990 and in 1992 (when the allocation regulations were partly revised) indicated that such points were not mandatory. *Id.*, at 26064; *Allocation of Federal and Non-Federal Expenses*, 57 Fed. Reg. 8990, 8991 (March 13, 1992). The Explanation and Justifications used terms such as “may be counted,” “may add,” “may also include,” and “allow” in providing for the use of specific non-Federal office categories.

Based on the language of the two Explanation and Justifications, the Commission concluded, in Advisory Opinion 1993-17, that the allocation regulations

impose a floor on Federal points and a ceiling on non-Federal points. A state party committee may take the highest number of non-Federal points allowable and must take the minimum number of Federal points that are required. A state party committee that proposes to apply a ratio entailing a higher Federal percentage may do so.

This concept of a floor on Federal points and a ceiling on non-Federal points is derived in part from the general principle of allocation expressed above; that is, the Federal portion calculated by using the ballot composition formula represents the minimum amount “to be paid” from the Federal account, and does not preclude the payment of a higher percentage with Federal funds. This indicates that, despite the fact that a committee has computed a specific ballot composition formula for administrative and generic voter drive expenses applicable for the entire election cycle, it is not precluded by the Commission regulations from paying for particular expenses with a higher percentage of Federal funds, or with only Federal funds.⁷

Conclusion

The Act and regulations state that the provisions of the Act and the rules prescribed under the Act “supersede and preempt any provision of State law with respect to election to Federal office.” 2 U.S.C. §453; 11 CFR 108.7(a). Commission regulations provide that Federal law supersedes State law with respect to the organization and registration of political committees supporting Federal candidates, the disclosure of receipts and expenditures by Federal candidates and political committees, and the limitations on contributions and expenditures regarding Federal candidates and political committees. 11 CFR 108.7(b).⁸ By their very nature, the allocable expenses of a State party committee, as distinguished from funds raised for and spent solely for the support of a non-Federal candidate, are intertwined with, and can affect, Federal election activity. With respect to your request, the Commission concludes that the Act and Commission regulations preempt any requirement imposed by APOC that would limit the amount of Federal account funds that ADP uses to pay for administrative and generic voter drive expenses.

⁷ The Commission notes that, if a committee chooses to pay a higher Federal share for any particular administrative or generic party expense than is provided for in its ballot composition formula presented on Schedule H1, it may not make adjustments in other administrative or generic voter drive disbursements, entailing a payment below the formula’s Federal percentage, to “recapture” the difference between the higher Federal amount paid for the first expense and the amount that would exactly reflect the Federal percentage in the formula.

⁸ The regulations provide that the Act does not supersede State laws concerning the manner of qualification as a candidate or political party organization, dates and places of elections, voter registration, voting fraud and similar offenses, or candidates' personal financial disclosure. 11 CFR 108.7(c). The Commission explained that these “types of electoral matters are interests of the states and are not covered in the Act.” Federal Election Commission Regulations, *Explanation and Justification*, House Document No. 95-44, at 51.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. See 2 U.S.C. §437f. Individual Commissioners have explained their reasons for voting to approve this opinion in separate concurring statements that accompany this opinion or that will be sent under separate cover.

Sincerely,

(signed)

Darryl R. Wold
Chairman

Enclosures (AO 1993-17 and Concurring Opinions)